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IN THE

Supreme Court of the United States

October Term, 1968

No. 80

EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENT IN OPPOSITION

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While petitioners feel that the points and arguments advanced by counsel for respondent have been fully refuted in their petition, they do wish to reply to some of the points raised and to stress the following facts.

I

The First Point Raised By Respondent Was That The Court's Ruling In *Garrity v. New Jersey*, 385 U.S. 493, Should Not Be Applied Retroactively.

Respondent stated that the California Supreme Court had not yet ruled whether *Garrity* is to be given retroactive application or prospective application only. However, even though this Court did not apply retroactively the rules enunciated by it in *Escobedo v. Illinois*, 378 U.S. 478, the California Supreme Court, in *People v. Dorado*, 62 Cal.2d 338, applied such rules retroactively to all cases pending either in the lower courts or on appeal. In short, until the cases were finally determined, the rules were applied. By analogy, it may be assumed that the *Garrity* decision would be similarly applied.

In *Malloy v. Hogan*, 378 U.S. 1 (decided June 15, 1964), this Court stated:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement –the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will, and suffer no penalty*, as held in *Twining*, for such silence." (Emphasis added.) (Citing *Mapp v. Ohio*, 367 U.S. 643.)

In the instant case, petitioner Peter Stafford was compelled, under threat of the loss of his job and his pension after seventeen years of service as a police officer, to testify before the Grand Jury and refrain from asserting his Fifth Amendment rights. While this testimony was given shortly

before the decision in *Malloy*, Stafford's trial and the use of such testimony therein to his prejudice took place long after the date of the *Malloy* decision. Clearly, *Malloy* was applicable to his case.

In *Garrity* this Court clarified the right against self-incrimination by announcing that it also belonged to police officers as well as to private individuals, and that compulsion could arise by reason of the imposition on the defendant of a choice "between self-incrimination or job forfeiture."

Respondent cites a number of cases where this Court denied retroactive application of certain cases; but these are clearly distinguishable in that in them there had been a finalization of the particular cases. In *Johnson v. New Jersey*, 384 U.S. 719, the judgments became final and no petition for certiorari had been filed in the United States Supreme Court. After the case had been finalized, there followed a battery of collateral attacks in state and federal courts, and the case finally reached this Court via a collateral attack.

In *Linkletter v. Walker*, 381 U.S. 618, this Court refused to apply *Mapp v. Ohio*, *supra*, to cases *finalized* before *Mapp*. In other words, this Court refused to apply retroactively the *Mapp* rule in connection with collateral attacks on convictions which had previously become final.

In *Tehan v. Shott*, 382 U.S. 406, petitioner's conviction had become *finalized* by the denial of certiorari after appeal. In the previous petition for certiorari, the issue as to the Ohio rule permitting the prosecutor to comment on the failure of the defendant to testify was not attacked. This Court stated in support of its decision not to apply *Mapp* retroactively (page 408): "All avenues of direct review of respondent's conviction were thus fully foreclosed more than a year before

our decision in *Malloy v. Hogan, supra,* and almost two years before our decision in *Griffin v. California, supra.*" The case went up by way of a collateral attack through habeas corpus after the judgment of conviction had been finalized, as the Court pointed out above.

In the case of *DeStaffano v. Woods,* 392 U.S. 631, involving jury trials in criminal contempt proceedings, this Court held that rights to jury trials in state cases cannot apply to cases not *commenced* to be tried prior to the decisions.

Thus, the non-retroactivity rule has been applied to cases where they have become final and the attacks on the convictions were collateral. The present case is clearly distinguishable since we are coming to this Court on "direct review" and not by way of collateral attack, and, hence, the rules announced in *Garrity* should be applied.

In some cases this Court has applied its decisions retroactively, such as *Gideon v. Wainwright,* 372 U.S. 335, and *Jackson v. Denno,* 378 U.S. 368. The Court stated in *Johnson* that it held in *Linkletter* and *Shott* that "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such application."

On the other hand, this Court has given, in effect, a retroactive application to cases on direct review in situations almost identical with the instant case. In the very recent case of *Gardner v. Broderick,* 392 U.S. 273, in August 1965, almost a year and a half before *Garrity,* petitioner, a police officer, was subpoenaed to appear before a grand jury which was investigating bribery and corruption. In its decision in this matter, the Court stated (page 274):

> "He was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination, but was asked to sign a 'waiver of immunity' after being told he would be fired if he did not sign. Following his refusal, he was given an administrative hearing and was discharged solely for this refusal pursuant to section 1123 of the New York City Charter. . . .
>
> "Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result may be self-incriminatory, and the need to implement its guaranty. (Citing cases, including *Spevack v. Klein*, 385 U.S. 511.) The privilege is applicable to state as well as federal proceedings."

The Court, after commenting on the fact that the discharge of petitioner occurred a year and a half before *Garrity*, stated (page 276):

> "In that case we held that when a policeman had been compelled to testify by the threat that otherwise he would be removed from office, *the testimony he gave could not be used against him in a subsequent prosecution* . . ." (Emphasis added.)

On page 279 the Court stated:

> "In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness to coerce a waiver of immunity it confers *on penalty of loss of employment*."

Thus, even though the refusal in *Gardner* to waive the

Fifth Amendment took place a year and a half before *Garrity*, the rule of *Garrity* was applied. It is to be noted that *Gardner* went up to this Court on direct review, as does the instant case.

A similar holding of this Court, on direct review, occurred in *Uniformed Sanitation Men Association v. Commission of Sanitation of New York*, 392 U.S. 280. Petitioners were dismissed for invoking the privilege against self-incrimination. This Court, in upholding their rights to do so and ruling that their discharge for so doing was illegal, applied *Garrity* retroactively. The Court commented (page 283):

> "They [petitioners] were dismissed for invoking and refusing to waive their constitutional right against self-incrimination . . . *Garrity v. New Jersey*, 385 U.S. 493 (1967), in which we held that testimony compelled by threat of dismissal could not be used in a criminal prosecution of the witness, had not been decided when these twelve petitioners were put to their hazardous choice."

In *Katz v. United States*, 389 U.S. 347, a similar position was taken by the government to the state in the instant case. Because government agents relied on previous decisions of this Court in using an electronic surveillance device, the government took the position that the decision of this Court should not be applied retroactively. But this Court rejected such view and stated (page 356):

> "The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial

sanction, we should retroactively validate their conduct. That we cannot do."

In the instant case, the state asks this Court to validate retroactively the conduct of the officers in compelling petitioner Stafford to testify before the Grand Jury and to waive his privilege against self-incrimination under penalty of being fired and of losing thereby his pension. Under the *Garrity* case, this type of coercion was held to be violative of the Fifth Amendment. Under the rules of the above cases, *Malloy* and *Garrity* should definitely be applied to the instant case and the contentions of the respondent rejected.

The Treatment Accorded Stafford.

Ancillary to the above is the fact that Stafford was picked up at the schoolyard before 9:00 a.m. and taken out of the city to a motel where he was forced to strip and submit to a degrading physical examination. Then later Stafford was taken to police headquarters and not released until midnight, at which time he was instructed by his superior officers to remain at home (house arrest) for some days. All of which is part of the compulsion applied to Stafford. (R.T. p. 2299) Stafford was told by his superiors, Captain Mills and Lt. Sporrer (R.T. 2456), that he could not refuse to testify. Lt. Sporrer said, "You know you can't refuse to testify. If you do it means dismissal." Stafford was subpoenaed by Captain Mills (R.T. 949-950-2299.)

Stafford testified that during his appearance before the Grand Jury, "[he] knew that if [he] refused to testify [he] would be fired." (R.T. 2314.)

The Testimony Before The Grand Jury Was Given By Stafford Under Compulsion, And The Use Thereof At His Trial Was Highly Prejudicial.

The respondent contends that Stafford was not prejudiced by the use of the Grand Jury testimony. In the interest of brevity, we respectfully refer the Court to pages 24 through 27 of our Petition for Certiorari.

Even the jury foreman asked to have Stafford's Grand Jury testimony read (R.T. 3269-3276) following the reading of some of Stafford's testimony before the Grand Jury in the prosecutor's final argument to the trial jury (R.T. 3248-3249).

The Telephone Interceptions.

Respondent brushes aside these telephone interceptions as all being under the control of the police and in use over their intercommunication system.

Even a policeman has the right to believe he is talking in privacy while investigating a case or otherwise.

For instance, the monitoring of Stafford's call (Exs. 57-59; R.T. 1151) to the Motor Vehicle Department in another building some five miles distant, without permission of either Stafford or the State Motor Vehicle Department employee, certainly was illegal and illustrates how far the prosecution went in this case.

The Lipowitz Incident.

This was highly prejudicial, and the trial court could have made more certain that no prejudice resulted, by interviewing the jurors and polling them on this issue. This the court refused to do. This evidence did not show

that Stafford was connected with the conspiracy. It was an entirely unrelated incident – elicited from Officer Gunn, the provocateur. (R.T. 907-908; 1010-1011; 2104) See *Sheppard v. Maxwell*, 384 U.S. 333.

CONCLUSION

As stated, we have not attempted to answer every point or argument advanced by respondent; we urge that such arguments have been answered in our Petition for Certiorari.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on OCTOBER , 1968, I served the within REPLY OF PETITIONERS TO BRIEF OF RESPONDENT IN OPPOSITION (Canard v. California - No. 80) on the following named parties, by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

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FOR: HONORABLE MARK BRANDLER, JUDGE

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER , 1968, at LOS ANGELES, CALIFORNIA.

_____
D. A. STandefer

SUBSCRIBED AND SWORN TO BEFORE ME
THIS DAY OF OCTOBER, 1968.

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